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AFFILIATED REGIONAL COMMUNICATIONS, LTD.

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January 25, 1993

BY HAND

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Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D. C. 20554

**RE: Development of Competition and Diversity in Video Programming
Distribution and Carriage, MM Docket No. 92-265**

Dear Ms. Searcy:

Enclosed are an original and nine (9) copies of the Comments of Affiliated Regional Communications, Ltd. We would appreciate your assistance in distributing a personal copy of the Comments to each Commissioner.

Thank you for your assistance in this matter.

Very truly yours,

David B. Gluck

Enclosures

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections 12 and 19) MM Docket No. 92-265
of the Cable Television Consumer)
Protection and Competition Act of 1992)
)
Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

COMMENTS OF
AFFILIATED REGIONAL COMMUNICATIONS, LTD.

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January 25, 1993

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SUMMARY

Affiliated Regional Communications, Ltd. ("ARC") has ownership interests in six regional sports programming services and in a national programming service which provides a "back-drop" feed to fifteen regional sports service affiliates. The regional sports services sell programming to cable and other multichannel video programming distribution system operators within their service areas. A division of ARC serves HSD owners either directly or through third-party wholesale program packagers.

ARC's regional programming services have maximized the distribution of their programming through a variety of different marketing techniques. The differences in the prices, terms and conditions offered by these regional services are tied to the different needs of its customers and to real differences in competitive conditions. Such differences are neither unfair nor discriminatory.

For example, in marketing the regional sports services affiliated with the Prime Network, ARC's HSD division packages all fifteen regional services and Prime Network to avoid the cost of fourteen additional tier bits at the DBS Center. Consequently, HSD subscribers in a Prime-affiliated regional service area receive not only the full programming schedule of that regional service, but also all non-restricted programming available on the other Prime-affiliated services. A number of other

differences in technology, operations and market conditions also demand different marketing approaches for service to HSD owners.

Regional sports services have employed various other distinctive marketing practices to expand the distribution of their programming. ARC's regional services generally have adopted a "concentric" pricing approach. As the distance between distributors and the "home teams" featured on ARC's regional services increases, the prices of their programming generally decrease to promote carriage on distant systems, where subscribers are less interested in such "home teams" and value the programming less. Because a programmer's distribution and revenues are affected by the distributors' methods of carriage (e.g. basic tier, other tiers, or a la carte), ARC's pricing, terms and conditions also vary depending upon the carriage of its services. In adopting any "bright line" regions of presumptively discriminatory or non-discriminatory pricing, the Commission must recognize these kinds of reasonable differences that expand distribution and promote competition.

At a minimum, exclusivity is an appropriate competitive response to enter new markets and to respond to competitive offerings of exclusivity in existing markets. In order to permit an orderly transition under the rules adopted to implement Section 628 and the numerous other rules required under the provisions of the 1992 Cable Act, the Commission should grandfather existing programming contracts upon which program purchase commitments were based.

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COMMENTS OF
AFFILIATED REGIONAL COMMUNICATIONS, LTD.

Affiliated Regional Communications, Ltd. ("ARC")
submits these comments in response to the Commission's Notice
of Proposed Rule Making ("NOPR") in this proceeding. Inflexi-
ble Commission rules which do not recognize the distinctive
characteristics of ARC's programming services would frustrate
the intent of Congress and limit the diversity of programming
available to consumers.

Preliminary Statement

ARC provides regional and national sports program-
ming for distribution to cable operators and other multi-
channel video programming distributors. ARC has ownership
interests in six regional sports programming services which
produce and distribute programming featuring a variety of
sporting events, including professional and collegiate con-
tests in their respective regions. Together with NBC Cable

Holdings and Rainbow Holdings, Inc., ARC has an ownership interest in Prime SportsChannel Networks, which distributes two national satellite sports programming networks, SportsChannel America and Prime Network. Nine additional regional sports programming services are affiliated with the Prime Network.¹

The regional sports services sell programming to operators of cable and other multichannel video programming distribution systems within their service areas. ARC has a separate division, Satellite Sports Network ("SSN"), which serves home satellite dish ("HSD") owners either directly or through agreements with other wholesale program packagers. The national networks currently serve as "backdrop" feeds, providing supplementary programming to the affiliated regional services. Prime Network is also available to HSD owners.

The nature of ARC's programming services demands substantial marketing flexibility in order to maximize distribution of those services. For example, there are significant differences between marketing regional sports programming to HSD owners and marketing similar programming to cable and other multichannel video programming distribution system

¹ The six regional sports programming services in which ARC has an ownership interest and the nine other regional services which are affiliated with the Prime Network and their respective geographic service areas are listed in Exhibits 1 and 2. The programming on these regional services generally includes professional baseball, basketball and/or hockey, collegiate contests, and a variety of other sporting events.

operators. Even with respect to cable distribution, ARC's pricing structure must be flexible in order to account for such factors as varying subscriber loyalties to the professional and collegiate teams, associations or conferences featured in each regional service, and the geographic licensing restrictions on the distribution of certain sports programming. The pricing of programming services also is affected by, among other things, the carriage of that programming as a basic, tiered or a-la-carte service.

Through distinctive marketing practices, including "concentric pricing" and product differentiation for the home satellite dish market, ARC has obtained broad distribution of its sports programming services. However, because Liberty Media Corporation has an ownership interest in ARC,² adoption of overly restrictive regulations in this proceeding will unduly inhibit ARC's flexibility in marketing sports programming services, impair ARC's ability to obtain carriage on cable and other distribution systems, and substantially diminish the diversity of programming available to consumers.³

² Liberty Media Corporation owns a controlling interest in ARC and holds various ownership interests in entities which own and operate cable systems. Likewise, several of the regional services affiliated with the Prime Network are partnerships or corporations in which cable operators hold various ownership interests.

³ ARC also believes that Section 628 of the 1992 Cable Act is constitutionally suspect. However, ARC understands that the Commission has not solicited comment on the constitutionality of the statute. Because the Commission has not proposed specific rules to implement Section 628, ARC cannot

I. Serving HSD Subscribers Is Fundamentally Different From Serving Cable And Other Multichannel Video Distribution System Operators.

Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") adds Section 628 to the Communications Act which requires the Commission, among other things, to establish regulations which:

prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest...in the prices, terms, and conditions of sale or delivery of satellite cable programming...among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups.

Section 628(c)(2)(B). Thus, the Commission's regulations must "distinguish discriminatory behavior...from legitimate business behavior." NOPR at ¶15. To develop appropriate discrimination standards, the Commission specifically seeks comment on "relevant differences between the programming distributor's customers that are necessary to make fair pricing comparisons." NOPR at ¶25.⁴ Aside from cost and signal secu-

determine whether the application of such rules to ARC would raise additional constitutional issues. Therefore, ARC expressly reserves its right to challenge the constitutionality of Section 628 and the Commission's implementing rules and does not waive such right by participating in this proceeding.

⁴ Each of the Commission's proposed regulatory options for developing "objective standards" for identifying discriminatory practices incorporates a comparison of the services provided by the programmer to its respective customers. With respect to its "safe harbor" option for reasonable ranges of price differentials, the Commission asks whether "different thresholds are necessary for different technologies." NOPR at ¶20. The same issue is presented in the form of "like ser-

rity differences acknowledged by the Commission,⁵ substantial practical, operational and technical differences require different marketing practices in providing programming to HSD owners and to cable and other multichannel video programming distribution systems.

To serve cable and other multichannel video programming distribution systems such as MMDS or SMATV, ARC's regional sports services deliver their respective signals to the system head-end, where it is received by the system operator and retransmitted over its distribution system to individual subscribers without any further involvement by ARC. Thus, by authorizing a single receive point at the head-end of a cable system, thousands of cable subscribers will receive ARC's regional sports programming. An ARC subsidiary performs its own cable authorizations and deauthorizations.

In contrast, each individual HSD subscriber must be separately authorized to receive programming. Whether the

vices" questions under the Section 202 option (NOPR at ¶21); "like grade or quality" considerations under the Robinson-Patman Act option (NOPR at ¶22); and "the underlying principles" used for price comparisons in anti-dumping cases (NOPR at ¶¶23-24). See, e.g., 19 C.F.R. §353.2(j) (defining "industry" to include the U.S. producers "of the like product"). Thus, the Commission's anti-discrimination regulations must account for differences in the services provided by the programmer to customers using different distribution technologies to deliver the programming to their subscribers.

⁵ "[W]e recognize that delivery of an encrypted signal to individual home satellite dish (HSD) subscribers may be more expensive -- and less secure from piracy -- than delivery to the head end of a cable system." NOPR at ¶17.

authorization is performed directly by SSN or by a third-party HSD program packager such as Showtime Satellite Network or the National Rural Telecommunications Cooperative, the separate facilities of the DBS Authorization Center are required to create and distribute the separate data stream necessary to authorize and deauthorize all individual HSD subscribers. Further, program codes identifying each program, the time remaining in that program, and the name of the next program are required. All of this information appears on the screen of the HSD subscriber but generally is unavailable to cable subscribers. Thus, SSN is required to use additional facilities and equipment (including a port and "tier bits" at the DBS Center) and to incur additional costs in order to serve the HSD market.

Moreover, in order to provide separately to an HSD subscriber the same programming provided by a regional sports service to a cable subscriber in the same geographic area, SSN would be required to maintain separate tier bits at the DBS Center for each regional service and the Prime Network. To avoid the cost of 14 additional tier bits, SSN combines all of the regional sports services affiliated with the Prime Network on a single tier bit and maintains a separate tier bit for Prime Network. Consequently, HSD subscribers within the service area of a Prime-affiliated regional service receive a substantially different and more valuable program product than cable subscribers in the same area -- including not only the

full programming schedule of that regional sports service, but also all non-restricted programming available on every other Prime-affiliated regional sports service.⁶

SSN also obtains additional programming rights from various sources to bolster its program offerings for HSD subscribers. For example, many HSD subscribers live in areas unserved by Prime-affiliated regional sports services or outside of the authorized distribution area of any professional sports team. Thus, if SSN marketed each of the regional services on a stand-alone basis, many HSD subscribers would be without the professional sports programming offered by Prime-affiliated services. Consequently, SSN separately negotiates with various professional sports leagues to obtain additional programming rights to serve HSD subscribers in these areas.

Finally, other market conditions differ significantly between HSD program packagers and cable or other operators that provide distribution facilities. For example, cable operators incur substantial costs in the construction, operation and maintenance of their distribution facilities. As a result, cable operators have the ability to distribute programming obtained from a wide variety of non-satellite sources, including locally originated programming and commer-

⁶ As more fully described in Section II-B, infra, professional sports teams or the leagues to which they belong may impose various restrictions on the geographic areas in which Prime-affiliated regional sports services may distribute games involving those teams. Such geographic restrictions do not necessarily coincide with the regional service areas.

cial advertisements. Such operators may have limited channel capacity, a wide variety of programming sources from which to choose, and the ability to supplement subscriber fees with advertising revenues. In contrast, SSN must deliver its signal to each HSD subscriber and must rely exclusively on subscriber fees for its revenues. HSD third-party packagers essentially take the service on "consignment" so that there is no committed volume and their customers are dispersed, generally precluding local promotion and advertising revenue. Consequently, ARC provides a different product to each of these customers pursuant to different prices, terms and conditions.⁷

In short, practical, technical and operational differences between serving HSD subscribers and serving cable and other distribution system operators demand different marketing techniques. The use of different prices, terms and conditions to serve each "market" evidences competition, not discrimination.

II. The Commission's Anti-Discrimination Regulations Should Permit "Concentric Pricing" Of Regional Sports Programming And Differentials Based On Carriage Conditions.

Regional sports programming services have employed a variety of distinctive marketing practices to promote broad

⁷ For example, the SSN program package is of little interest to a cable operator because it would use multiple channels and provides no opportunity for advertising revenues.

distribution of their programming. They have developed flexible pricing policies to account for different levels of interest in their featured professional and collegiate sports programming in different areas and to reflect the geographic restrictions imposed by such teams and their respective leagues. In addition, the regional sports services have adopted pricing policies to promote carriage of their services on basic or other popular program tiers in order to increase the distribution of their programming. Overly restrictive regulations may inhibit the distribution of regional sports programming, undermining not only the public interest in program diversity, but also the "substantial governmental interest" in the local origination of programming. See 1992 Cable Act, §2(a)(10).

A. Concentric Pricing Expands Distribution
Of Regional Sports Programming And
Promotes Competition.

In attempting to develop rules to distinguish between discriminatory and legitimate business practices, the Commission must consider whether particular conduct has "the purpose or effect" of substantially hindering or preventing a multichannel video programming distributor "from providing satellite cable programming...to subscribers or consumers." Section 628(b). To examine the competitive consequences of different pricing practices, the Commission expressly solicits examples of: (1) "pricing practices...that

may employ a graduated pricing structure in order to facilitate broad program distribution;" and (2) "situations in which a 'uniform' pricing requirement could reduce the amount of programming available to subscribers." NOPR at ¶15. ARC's regional sports services are good examples of both.

To promote broad distribution of its regional sports services through carriage on cable and other multichannel video distribution systems, regional sports services employ a pricing policy known as "concentric pricing."⁸ Pursuant to that policy, such services charge higher prices to those cable and other multichannel video programming distribution systems located nearest to the "home teams" featured on each respective service. As the distance between the distributor and the "home team" increases, the regional services' prices for its programming generally decrease to promote carriage on distant systems where subscribers may not be as interested in the "home team." For example, Prime Sports Network-Midwest ("PSN-Midwest") is an ARC regional sports service featuring professional basketball games of the Indiana Pacers, as well as other sporting events and sports news. PSN-Midwest provides its regional sports programming to cable and other multichannel video programming distribution systems in Illinois, Indiana, Missouri, Ohio, and Wisconsin. PSN-Midwest charges

⁸ As described in Section I, supra, ARC has developed a separate product and separate marketing plan to respond to the different demands of the HSD market.

distributors closer to Indianapolis, the home of the Pacers, higher prices than distributors on the periphery of PSN-Midwest's service region because subscribers to systems in the center of the service area value the programming more than subscribers in distant systems, where fan loyalties may favor the Chicago Bulls or Cleveland Cavaliers.

The concentric pricing approach has allowed PSN-Midwest and other ARC regional sports services to compete more effectively for carriage in outlying areas, where system operators place lower value on the professional sports programming carried on those services. If the Commission were to impose a "uniform" pricing requirement (NOPR at ¶15), these cable operators would have decreased incentives to carry ARC's regional services and would substitute other programming, forcing the service to increase prices to the nearer systems. The net result would be restricted distribution of the regional sports services, higher prices for cable and other distribution system operators, and reduced programming diversity for consumers. Recognizing the decreasing value of a regional sports service and pricing accordingly to expand distribution is not discriminatory.⁹

⁹ For example, in rejecting a claim of discrimination under the Robinson-Patman Act, the Court found that charging lower prices for the same local newspaper outside the town of publication was not discriminatory because the newspaper contained less local news and advertising of interest and had "lesser value to the reader." See Morning Pioneer, Inc. v. Bismarck Tribune Co., 342 F. Supp. 1138, 1141 (D. Minn. 1972), aff'd on other grounds, 493 F.2d 383 (8th Cir. 1974).

Thus, "concentric pricing" is a classic example of a "graduated pricing structure" in which the differentials are not cost-based but clearly are essential to "facilitate broad distribution." Because it promotes rather than hinders distribution and diversity, and fosters competition among programming providers, concentric pricing cannot be regarded as unfair or discriminatory.

B. Price Differentials May Reflect Licensing Limitations.

In addition to viewer interest, this concentric pricing approach takes into account other market factors. The professional sports teams carried on ARC's regional sports services, or their respective leagues or conferences, also may impose geographic limits on the areas in which the regional service is authorized to distribute a team's games. Consequently, the regional service may make price adjustments for cable, MMDS and SMATV operators in areas for which the service's distribution rights for one or more of the teams are restricted.

For example, Home Sports Entertainment ("HSE") serves the operators of cable and other multichannel video distribution systems in Texas, Arkansas, Louisiana, New Mexico and Oklahoma. This regional service features the Dallas Mavericks, Houston Rockets and San Antonio Spurs professional basketball teams, the Houston Astros and Texas Rangers professional baseball teams, and the collegiate teams of the

Southwest Conference. Because each of the professional teams or their leagues may restrict HSE's rights to show their games to different geographic areas, different portions of HSE's program schedule may be "black-out" or contain substituted programming in different areas of the region.¹⁰ Obviously, HSE's price to cable and other distribution system operators in the "black-out" areas may differ from its price to similar system operators in other areas. Price differentials resulting from such licensing restrictions are neither "unfair" nor "deceptive" and should not be considered discriminatory under Section 628.

C. Price Differentials Based On Conditions Of Carriage Are Not Discriminatory.

ARC's regional sports programming services charge cable and other multichannel video distribution system operators different prices depending upon how the service is marketed to subscribers. Programming prices usually are based on a monthly per-subscriber fee, and the number of subscribers will vary dramatically depending on whether the service is offered as part of the basic tier, an expanded basic tier or a higher-priced programming tier, or as an a-la-carte pay service. Typically, the number of subscribers to a program-

¹⁰ Section 628(c)(3)(A) specifically provides that ARC's regional sports programming services are not required "to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution."

ming service decreases with non-basic and a-la-carte carriage while the cable operator's per-subscriber revenue from carrying that service may increase. Consequently, differences in the programmer's prices and terms based on carriage are non-discriminatory pursuant to Section 628(c)(2)(B)(i), which expressly permits programmers to "impose reasonable requirements for...offering of service." Such price differentials also are justified pursuant to Section 628(c)(2)(B)(iii), which authorizes programmers to charge "different prices" based on "direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."

III. Any Commission Standards Establishing "Reasonable Regions" Of Program Pricing Must Recognize Basic Differences Among Services.

Although a "bright line" region of non-discriminatory price differentials would provide guidance to programmers and decrease the administrative burden on the Commission, the boundaries of such regions must reflect numerous differences in programming services and their delivery. Among other things, differences in service content (as well as its cost and value), the costs of distributing a service through various technologies, and the manner of carriage must be accommodated in any such standard.

In addition to the underlying differences in HSD distribution, concentric pricing, and carriage outlined above,

there are numerous other differences that fairly may be reflected in prices, terms and conditions. For example, advertisers have refused to include HSD subscribers in total viewership for purposes of calculating advertising payments. Large-volume distributors cost less to service and provide additional economic benefits through increased advertising revenues and widespread promotion and recognition of a service. Programming services face different competitive conditions (e.g. number of competitors, prices, or channel capacity) with different distributors and in different geographic regions. Based on their credit history or lack thereof, different customers may present different credit risks. ARC offers these differences only as illustrative examples of clearly justifiable bases for differences in prices, terms and conditions which are neither unfair nor discriminatory. A Commission standard which would presume discrimination based on these kinds of price differences would stifle competition and limit the availability of programming to viewers.

IV. The Commission Should Permit Exclusive Arrangements To Promote New Services And To Respond To Competitive Offerings.

Section 628(c)(2)(C) and (D) require the Commission to adopt regulations prohibiting certain practices, "including exclusive contracts," that prevent a multichannel video programming distributor from obtaining satellite programming from

a satellite cable or satellite broadcast programming vendor in which a cable operator has an attributable interest. However, an exclusive agreement for distribution of satellite programming in areas served by a cable operator may be permitted if the Commission finds the agreement to be in the public interest pursuant to Section 628(c)(4). ARC submits that, at the very least, exclusivity arrangements should be permissible to: (1) introduce and promote new programming services or existing services in previously unserved areas; and (2) meet the competitive offering of exclusivity by another programmer to distributors in the same geographic area.

The Commission repeatedly has stated that exclusivity is a "useful and appropriate" competitive tool for "cable as well as broadcasting." See, e.g., Syndicated Exclusivity, 3 FCC Rcd. 5299, 5310 (1988), aff'd sub nom., United Video, Inc. v. F.C.C., 890 F.2d 1173 (D.C. Cir. 1989). Nevertheless, because it feared that alternative distributors would be hindered in competing with cable if denied access to popular programming, the Commission recommended that Congress implement a "temporary, limited and targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming." Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 5031 (1990). At the same time, the Commission recognized that, absent exclu-

sivity, certain "free rider" problems will arise which may diminish incentives to invest in new programming services. Id. at 5009-10. Thus, even if the limitation of exclusivity in Section 628 were appropriate for established and popular programming, there clearly is no reason to limit exclusivity for new services or existing services trying to enter new markets.

Exclusive arrangements for such services are unlikely to have the effect of "significantly hindering or preventing" a multichannel video programming distributor from providing satellite programming to consumers. On the contrary, for new services or existing services trying to enter new markets, exclusivity may expand the programming available to consumers and foster competition. At the same time, prohibiting exclusivity will eliminate any incentive for new investment in programming services, particularly local or regional services such as the ARC regional sports services. Congress has found that there is a "substantial government interest" in "the local origination of programming...[and] in ensuring its continuation." See 1992 Cable Act, §2(a)(10). Consequently, ARC supports the Commission's proposal to find exclusive distribution contracts for new program services (and existing services in new markets) or locally originated programming services to be in the public interest.

In addition, the Commission should find that exclusivity agreements serve the public interest where they permit

a programmer to respond to the competitive offering of another programmer. Thus, where another programmer offers a cable operator an exclusive arrangement as an inducement to obtain carriage, a "vertically integrated" programmer should be permitted to match that offer of exclusivity. Existing services should not be competitively handcuffed and disadvantaged by the Commission's regulations.

V. The Commission Should Grandfather Existing Programming Agreements.

Despite its tentative conclusion that "any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts" (NOPR at ¶27), the Commission has expressed concern that "the long term nature of many programming agreements" might frustrate the intent of Congress if existing programming contracts were grandfathered. ARC strongly supports the Commission's tentative conclusion to grandfather existing programming agreements.¹¹

Regional sports services have planned and contracted for programming acquisitions based on existing distribution agreements. Unlike programmers of syndicated programming and movies, they cannot alter their programming schedule or ware-

¹¹ A necessary corollary to that conclusion precludes parties which negotiate new contracts under the new rules from claiming discrimination based on preexisting contracts. New rules under Section 628 and other provisions of the 1992 Cable Act may significantly affect programming prices, terms and conditions.

house programming pending the negotiation of new contracts. The sporting events which regional services have contracted to carry will occur as scheduled and immediately cease to have value as programming thereafter.

Natural expiration of existing agreements will provide a gradual transition period for implementation of the new rules. Because most of ARC's programming agreements originally had three- to five-year terms, grandfathering those agreements would not frustrate the intent of Congress and clearly would be preferable to the chaos which would result from immediate implementation of the new rules. As a practical matter, ARC simply would not have the manpower to engage in simultaneous renegotiation of all programming agreements. ARC has two in-house attorneys and approximately six staff members responsible for hundreds of programming agreements. If simultaneous renegotiation of its existing agreements were necessary, ARC's other operations would come to a halt.

Conclusion

Regional sports programming services -- televising local professional and collegiate sporting events and other sports programming -- are distributed through a variety of different marketing practices responsive to the different needs of their customers and varying competitive conditions. Such differences are neither unfair nor discriminatory in intent or effect. Regulations which ignore these differences

will restrict distribution of regional sports programming,
thereby decreasing the diversity of programming available to
consumers and increasing its price, contrary to the clear
intent of Congress.

January 25, 1993

Respectfully submitted,

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